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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-703

UNITED STATES OF AMERICA,
Appellant,

v.

FIRST NATIONAL BANCORPORATION, INC.

and

THE FIRST NATIONAL BANK OF GREELEY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF FOR THE COMPTROLLER OF THE CURRENCY AS *AMICUS CURIAE*

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INTEREST OF THE COMPTROLLER OF THE CURRENCY

The Comptroller of the Currency (Comptroller) has ecific bank supervisory responsibility over all national nks, including appellee The First National Bank of reeley and First National Bank of Denver, the principal "lead" bank of appellee First National Bancor-

poration, Inc. There were 4,600 national banks operating 13,106 branches as of December 31, 1971.[1] The Comptroller's supervisory responsibility includes the periodic examination of all national banks and the approval or disapproval of *de novo* branches for them. The Comptroller also possesses exclusive jurisdiction over applications to charter new national banks.

As part of his responsibility to supervise national banks, the Comptroller is required to approve or reject all mergers or consolidations of banks where the resulting institution is to be a national bank and to comment upon the competitive factors to the responsibile agency in any other type of bank acquisition.[2] In approving or rejecting mergers the Comptroller must apply statutory standards identical to those involved in this case.[3] In the instant case, the Comptroller advised the responsible agency, the Federal Reserve Board, of his judgment regarding the competitive factors and the Board subsequently approved the acquisition.

The Federal Deposit Insurance Corporation (FDIC) which must approve or reject under these same statutory standards mergers of state-chartered non-member banks, has filed a brief *amicus curiae* presenting its views. We believe that many of the FDIC's arguments are spurious or erroneous. While we believe that the statutes permit the FDIC to follow its views in the cases coming before

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[1] Annual Report of the Comptroller for 1971.

[2] Excepting holding company acquisitions of state-chartered banks. 12 U.S.C. 1828(c)(4), 1842(b).

[3] *Compare* Section 3(c) of the Bank Holding Company Act of 1956, 70 Stat. 134, as amended, 80 Stat. 237, 12 U.S.C. §1842(c), *with* Section 1(a) of the Bank Merger Act of 1966, 80 Stat. 7, 12 U.S.C. §1828(c).

we do not believe that the Court by its decision in this se should compel the Comptroller and the Board of overnors of the Federal Reserve System to adopt the DIC's peculiar conception of the nation's future nking structure. Our brief thus is directed more to ues raised by the FDIC than to the outcome of this rticular litigation.

SUMMARY OF ARGUMENT

The FDIC does not need any interpretations of the ayton Act to empower it to decide individual merger ses so as to further its conception of optimum state nking structures. The FDIC and the other banking encies have always had and have exercised a discretion hich is broader than the mandates of the antitrust laws.

The FDIC, in the guise of a request for guidance to elf, is really seeking to have this Court constrain the scretion of the Federal Reserve Board and the mptroller of the Currency in a manner which Congress ver intended.

The FDIC's conception of optimum state banking ucture reflects an institutional bias resulting from the nited size and local nature of the state-chartered nmember banks whose mergers it must approve. This nception emphasizing *de novo* growth of branch and lding company systems is unrealistic and beyond ayton Act requirements of reasonable probability.

This Court has held that commercial banking markets e essentially local. The probable effects of an acqui- ion on local markets is of greater significance than eculative future effects on projected statewide markets. he FDIC is free to give great weight to such future ssibilities if it wishes, but this Court should not require e other banking agencies to do so.

Willingness of an applicant to enter a market by merger does not indicate a willingness to enter *de novo*. Most of the factors to be weighed in merger cases involve subjective judgments. The factors emphasized by the FDIC are no more "objective" than those emphasized by the Comptroller.

Testimony by bankers as to their intentions with respect to particular markets is admissible and relevant. The credibility and amount of weight to be given such testimony is up to the District Court.

Contrary to the FDIC position, economies of scale are often important and significant in bank acquisitions.

The testimony of incumbent chartering officials as to whether they would approve the entry of new banks or branches into an area is not only admissible, but conclusive as to the probability of entry within the time period relevant to Clayton Act considerations.

ARGUMENT

I.

ESTABLISHING THE OPTIMUM BANKING STRUCTURE FOR EACH STATE IS A FUNCTION OF THE BANKING LAWS, NOT OF THE CLAYTON ACT.

The overriding justification asserted by the FDIC for its intervention is an alleged need for this Court to establish parameters of the Clayton Act for the guidance of the bank regulatory agencies as to which bank acquisitions they ought accept or reject. This alleged need, however, is based on the wholly erroneous premise that the FDIC must confine itself to the standards of the Clayton Act in passing upon merger applications, and otherwise possesses no discretion to attempt to create

through its decisions a competitive banking structure. In fact, however, all three banking agencies have exercised such discretion, and will continue to do so whatever the outcome of this case. What the FDIC is really asking the Court to do is to impose on the Board of Governors and the Comptroller the FDIC's conception of what the banking structure should be, a result clearly not intended by Congress.

A. The FDIC's Views on Statewide Banking Structure Are Permissible in its Inherent Discretion, but Are Not Mandated by the Clayton Act.

The FDIC argues that the banking agencies, in their merger decisions, "... must be allowed to check in their incipiency further increases in statewide concentration levels ...." (FDIC Br. 6).[4] It points out that the banking agencies "... may consider it necessary to deny a particular acquisition in order to prevent or to minimize an undue concentration of the total commercial banking resources of a particular state." (FDIC Br. 15). In a press release concerning the filing herein of its *amicus* brief, the FDIC explained:

> The principle [sic] concern of the FDIC is that the Court so word its opinion that the banking agencies know whether they should continue to consider questions of potential and future competition and state-wide banking structure in their decisions under the Bank Merger Act ....

FDIC Press Release 35-72 (5-22-72). The FDIC suggests that these questions are raised in this Clayton Act proceeding. (FDIC Br. 3)

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[4] "FDIC Br.__" refers to the brief submitted by the FDIC as *amicus curiae*; "App. Br.__" refers to the brief of the Department of Justice.

This expressed concern of the FDIC appears feigned. The same press release by the FDIC also stated:

> In recent years, however, bank regulatory agencies have regularly examined the possible elimination of potential competition between two applicants in their analysis of bank merger and bank holding company applications, and have denied proposed acquisitions on these grounds.

The FDIC has recently told a district court that:

> Under the Bank Merger Act the FDIC has the authority and the responsibility to disapprove certain proposed mergers which would not currently rise to the level of Sherman Act or Clayton Act violations . . . .[5]

Indeed, the FDIC submits as an appendix to its brief "... representative opinions by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the FDIC denying applications at least in part on such issues . . . ," *i.e.*, "issues of potential competition in the future between the acquiring company and the bank it seeks to acquire, and . . . issues involving the future structure of commercial banking in a particular state." (FDIC Br. 3-4).

The authority of the banking agencies to exercise discretion on these issues of banking structure and banking competition is not bottomed on the Clayton Act. Thus, for example, long before this Court determined in *United States v. Philadelphia National Bank*, 374 U.S. 321, that the Clayton Act applied to banking, and long before this Court first enunciated the potential

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[5] *Washington Mutual Savings Bank, et al. v. FDIC*, W.D. Wash., Civ. No. 45-71C3 (1972), Defendant's Opening Memorandum in Support of Motion for Judgment on the Record, p. 2.

competition doctrine, the Comptroller had denied the acquisition of the second largest bank in Westchester County, New York, by the second largest bank in New York City on the ground that large scale entry by this merger would cause an unreasonable distortion and dislocation in the present and future banking structure of Westchester County not consistent with the public interest standards set forth in the Federal banking laws, despite his finding "that the effect of this merger would not be to substantially lessen competition or tend to create a monopoly or unreasonably restrain trade . . ." (*infra*, p. 25a). (Opinion reproduced in full in Appendix A.) Other similar decisions by the three banking agencies are found in Appendix A to the FDIC brief.[6] Additional instances where the competitive results sought by the FDIC or the appellant have been reached under existing law include 10 of the 13 cases in the New York study (FDIC Br. 8), and the developments in Colorado since appellees' application was filed (App. Br. 7, n. 9; 25, n. 28 and accompanying text; 33-34, nn. 33-35 and accompanying text).

Such decisions are based not on the Clayton Act, but on the inherent discretion vested in the banking agencies to help create a viable banking system through decisions on individual applications. See, *e.g.*, *Board of Governors v. Agnew*, 329 U.S. 441, 449 (Mr. Justice Rutledge, concurring); *Apfel v. Mellon*, 33 F.2d 805 (D.C. Cir.), *cert. denied*, 280 U.S. 585; Report of the

[6] The Federal Reserve Board has noted in an opinion not cited by the FDIC that "... any significant lessening of competition, even though it may not be such as to violate the Clayton Act, is to be weighed as an adverse consideration against any relevant favorable considerations." *First Bank Stock Corporation*, 46 Fed. Reserve. Bull., 486, 493 (1960).

Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess., at 142-143.[7] House Report No. 1221 on the Bank Merger Act of 1966 specifically noted that the factors listed in that statute " . . . would not preclude the banking agencies, charged as they are with general supervisory responsibility, from considering in any particular case such other factors as they might deem relevant." H.R. Rep. No. 1221, 89th Cong., 2d Sess., 4 (1966).

We thus believe it to be clear that Congress intended for the banking system to be structured by the statutes pertaining specifically to banking and defining the function of the banking agencies; and that Congress did not undertake in the Clayton Act to prescribe an optimum banking structure for each state. The banking agencies may not approve a merger which violates the potential competition tests of the Clayton Act, but it is also clear that the antitrust statutes do not impair the banking agencies' pre-existing discretion to " . . . consider the likely impact of a proposed acquisition on future competition within a broader area than the markets presently being served by the parties to the acquisition." (FDIC Br. 12). Thus there is no occasion for the Court in this case to consider the questions of statewide banking structure raised by the FDIC.

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[7] As recently as June of this year it was noted in *First National Bank of Fairbanks v. Camp*, No. 71-1367 (D.C. Cir. June 7, 1972) that:

> . . . the Comptroller could not be forced to approve the branch because his action would be within the scope of his discretion protected from mandamus or the normal standards of judicial review.

B. This Court Should Not at the Request of the FDIC, Whose Views Reflect its Regulatory Responsibility for Small Banks, Circumscribe the Congressionally Intended Discretion of the Comptroller and the Federal Reserve Board Concerning the Structure of the Banking System.

The inadequacy of the FDIC's stated interest in this case creates grave doubts as to the Corporation's posture before this Court. Since the bank regulatory agencies are not in the least inhibited in interpreting their public interest responsibilities much more broadly than whatever standards this Court may choose to set for the Clayton Act, it is apparent that the FDIC seeks not guidance as to its own conduct but rather it seeks constraints on the conduct of others, specifically, the Federal Reserve Board and the Comptroller. We respectfully suggest that, for this purpose, the FDIC does not have an interest sufficiently disparate from that of the Appellant herein to justify a separate brief. In any event, the FDIC's views are erroneous, and should not be interpreted by this Court into statutes governing the nation's banking system, and indeed the nation's entire economy.

1. *The FDIC's Views on the Competitiveness of Small Local Banks Are Contrary to the Comptroller's Experience with Statewide Banking Systems.*

We can readily understand how the discretion vested in the FDIC might lead it to foster a banking structure different from that which the Comptroller and the Board of Governors might envisage. The average bank supervised by the FDIC as of June 30, 1971, had $12.8 million in deposits. By contrast the average bank supervised either

by the Comptroller or the Board had $70 million in deposits—over five times as large. Banks supervised by the Comptroller or the Board held in total over 80% of the nation's total commercial bank deposits. Thus the FDIC might naturally think of small, local banks as the optimum competitor. Our experience, however, has been that parallel competitive policies are more likely in local markets dominated by local banks than when markets of similar size are occupied by holding company subsidiaries or offices of large branch bank systems. In California, for example, there are 144 commercial banks compared to 1,118 in Illinois; yet it is the former that offers—by far—the larger number of competitive options per market and a considerably higher level of competitive activity. The same comparison might be made between Virginia and Iowa, or North Carolina and Indiana. We believe that this high level of aggressive competition in local markets in California, Virginia, and North Carolina is due largely to the affiliation of local banks into statewide banking organizations. Thus, we disagree with the FDIC's conclusion that in states with "high concentration" (presumably Colorado qualifies), no bank of size ought be permitted to acquire any local bank, at least not one in excess of nominal size.

2. *The FDIC's Suggestion of Development of De Novo Statewide Systems Is Speculative and Does Not Meet the Clayton Act Test of "Reasonable Probability."*

The FDIC apparently would like to retain the larger local banks and also develop statewide chains through *de novo* entry. This is unrealistic. A market served by a large average number of banks could not be broken into except

at the cost of years of losses [8] and acceptance of a modest ultimate share. Assuming an organization determined to enter other markets despite such a cost, we wonder how many it could reach in a decade or two. Even a large wholesale bank could not subsidize more than one or perhaps two such markets at a time. It would take several lifetimes for such an organization to become statewide. But then we would have only *one* statewide organization. To have more than one we would have to assume several organizations indifferent to their shareholders reasonably short run interests. Even one such organization strains credibility.

Thus we suggest that the FDIC's approach in fact would delay the development of competitive statewide banking systems. And, in any event, the adoption of such a speculative conception of the banking structure is not mandated by the Clayton Act. The standards of the Clayton Act, as we understand them, are not aimed at mere possibilities.

In *Brown Shoe Co. v. United States*, 370 U.S. 294, this Court, with regard to the standards of proof in a §7 Clayton Act case announced at p. 323:

> . . . Congress used the words *"may be* substantially to lessen competition" [the Court's emphasis], to indicate its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; *no statute was sought for dealing with ephemeral possibilities.* Mergers with a probable anticompetitive effect were to be proscribed by this Act . . . . (Emphasis supplied)

Thus appellant must demonstrate " . . . a reasonable probability that the acquisition is likely to result in the

[8] Our experience with newly chartered national banks is that a minimum of two years elapses before the operation begins to earn even a modest profit.

condemned restraints." *United States v. DuPont & Co.*, 353 U.S. 586, 607.[9]

Thus a basic question in every potential competition case is whether or not the acquiring bank would in reasonable likelihood have entered the market of the acquired bank, but for the merger. This question cannot be answered–as the FDIC and appellant seem to suggest–by assuming that willingness to enter a market by merger demonstrates willingness to enter *de novo*. Such a solution would make every merger illegal, and for this reason was rejected in *United States v. Crocker-Anglo National Bank*, 277 F. Supp. 133, 184-185 (N.D. Calif., three judge court):

> The second proposition is that proof of entry or desire to enter by *merger* does not by itself prove the ability or desire to enter *de novo*. Many of plaintiff's proposed findings are based on this premise. If this line of reasoning were followed, all mergers would be illegal. In all cases the fact of merger, or contemplated merger, demonstrates a desire to achieve the advantages of the merger. Plaintiff states: 'Crocker-Anglo had long been interested in moving into the rapidly expanding Los Angeles area', and it speaks of 'Crocker–Anglo's desire to move into Los Angeles'. The Government's propositions are true only if we add, 'by merger', to them. Upon analysis, therefore, the Government's propositions are simply another way of stating that all mergers (except of failing businesses), are illegal or that 'the most obviously illegal aspect of the proposed merger is the merger

[9]See also *United States v. Penn-Olin Chemical Co.*, 246 F. Supp. 917, 934 (D. Del.) aff'd by an equally divided Court, 389 U.S. 308.

agreement itself". This approach was clearly rejected in the majority opinion in *Penn-Olin*.

The speculative nature of the FDIC's position is shown y its complete lack of any suggested time frame for the ossible competition it foresees. We believe, however, iat a predicted time frame is critical, *i.e.*, that in proving n alleged Clayton Act violation based on potential ompetition it must be shown that—but for the merger—ompetition between the acquired and the acquiring bank likely to develop within a reasonably foreseeable span f time. The Westchester County opinion found in ppendix A again serves to illustrate our point. There the omptroller found that the Westchester banks had not een as competitive in their rate structures as had the ew York City banks. This factor argued *for* the cquisition under consideration since the more competi-ve New York City rates would then more quickly come bear upon the Westchester system. But because estchester had just been opened to branching by New ork City banks which were anxious to follow their istomers to the Westchester suburbs and because the omptroller was willing to grant and the market was able support a large number of additional branches if the estchester banks did not promptly react in an appro-iate competitive fashion, the Comptroller could opt for *novo* entry.

In Greeley, however, there is an entirely different fact ttern. The Community is not a suburb of Denver; the enver banks have no impelling drive to charter new nks in Greeley and the market is not one where the omptroller would be inclined to grant new charters ther now or in the reasonably foreseeable future. Add these factors the competitive weakness of the bank to acquired, and it was not unreasonable for the Federal

Reserve Board to determine that merger was the appropriate direction for that market. Surely the Board was not precluded from reaching this conclusion either by the Clayton Act or by the speculative banking structure foreseen by the FDIC.

3. *The FDIC's Views on Economies of Scale Are Unsupported and Erroneous.*

There is no concrete or meaningful data presented by the FDIC to support its conclusion that economies of scale—particularly in affiliated, chain, or branch banking groups—are insignificant. (FDIC Br. 17). The FDIC's startling assertion of this conclusion can be explained only by an institutional bias of that agency in favor of the small banks which, for the most part, compose its regulatory constituency. The only actual data presented by the FDIC is drawn from an analysis of the 1968 operating costs of a "nationwide sampling of 972 banks," from which the FDIC concludes "that consolidation of unit banks into multi-office or multi-bank organizations does not result in significant economies of scale in operations." (FDIC Br. 18). The data, however, supports an opposite conclusion. In the case of business loans, the FDIC brief reports that a 10 percent increase in output led only to an 8.761 percent increase in costs. Similarly, a 10 percent increase in the output of real estate loans led only to an 8.139 percent increase in costs and a 10 percent increase in "securities and investments" led only to an 8.245 percent increase in costs. A fourth function, demand deposits, also showed a lessening of unit costs as output increases although the divergence was less substantial; a 10 percent increase in demand deposit accounts led to an increase of 9.771 percent in the cost of servicing such accounts. Thus, of the seven commercial bank ser-

vices studied, significant economies of scale were found to exist in three, and smaller economies were realized in a fourth.

The only other data presented by the FDIC is, as we understand it, completely hypothetical. A specific cost equation developed by researchers in 1968 from the manipulation of 1965 data is applied to information gathered from some other survey in 1970 to produce a mythical table of figures of relative costs of various classes of small banks–all under $50 million in depsoits. (FDIC Br. 18-20 and 86-90). In addition to being wholly speculative and not introduced into the record before the district court, these figures in no way support the FDIC's contention (FDIC Br. 17) that statewide banking systems–which tend to be $500 million or larger–do not realize economies of scale.[10]

Finally, many of the authorities referred to by the FDIC (FDIC Br. 17-18, nn. 13-14) do not support the propositions for which they are cited, as the following quotations indicate:

David A. Alhadeff:

> "... there is certainly a strong presumption that branch banking per se as compared with smaller unit banks, provides net economies in making small loans.[11]

Paul M. Horvitz, Director, Division of Research of the FDIC:

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[10] Indeed, if statewide systems do not generate economies of scale, it seems most unlikely that such a system could ever be created by *de novo* entry as envisoned by the FDIC.

[11] David A. Alhadeff, *Monopoly and Competition in Banking* (Berkeley: University of California Press, 1954), p. 105.

[With reference to the ratio of current operating expenses to loans and investments]

" . . . current operating expenses tend to decline as bank size increases. In every year there was a decline over the first three size groups. In every year the largest size group had the lowest costs and in most years the next largest group was second lowest. The declines were usually sizable from the smallest to the third smallest group, and from the next largest to the largest, but over the middle range of bank sizes there was virtually no decline.[12]

Neil B. Murphy:

"For those activities requiring more skilled human resources than the 'factory' operations of the typical bank there were significant economies of scale. . . ."[13]

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[12] Paul M. Horvitz, "Economies of Scale in Banking," in Commission on Money and Credit, *Private Financial Institutions* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1963) p. 14.

[13] Neil B. Murphy, "A Re-estimation of the Benston-Bell-Murphy Cost Functions for a Larger Sample with Greater Size and Geographic Dispersion," FDIC, Working Paper No. 71-22, p. 6. See also Lyle E. Gramley (Associate Director, Division of Research and Statistics, Board of Governors, Federal Reserve Systems) "Interpretation of Size-Cost Relationships in Banking," *Monthly Review*, Federal Reserve Bank of Kansas City, March, 1961, p. 9:

"The cost advantages of larger banks in the District . . . appear to result both from higher efficiency in the performance of regular banking functions comparable to those performed at small banks and from the acquisition of earning assets in larger dollar amounts."

Stuart I. Greenbaum, "Competition and Efficiency in the Banking System–Empirical Research and its Policy Implications," *Journal of Political Economy*, Vol. 75, No. 4, Part II, Supplement: August, 1967, p. 470:

"Not only are there savings attendant to increases in plant size, but, in addition, cost reductions accompany increases in

In short, the FDIC's conclusions on economies of scale e unsupported and erroneous.

C. This Court Has Held the Local Banking Market To Be the Appropriate One for Applying the Clayton Act.

This misinterpretation in the FDIC brief of the gnificance of economies of scale leads in part to the DIC's erroneous conclusion that the banking agencies ould tolerate small, non-competitive local banks for me unspecified period of years. By contrast, we believe at statewide banking systems in a given local market ually operate more efficiently, compete with each her more vigorously, and offer the banking public the me or better services at a lower cost. Since "commercial alities in the banking industry make clear that banks nerally have a very localized business," *United States v. illipsburg National Bank*, 399 U.S. 350, 362,[14] the obable effect of the merger in the local banking market far more significant than the effect which the FDIC resees on a mythical, statewide banking market. deed, we wonder what the decision of this Court might ve been in *Phillipsburg* if the competitive impact had

firm size when output per plant is held constant. This suggests that grouping independent unit banks into branch systems results in savings even if the output of each element in the system is unchanged."

d, Carter H. Golembe, "The Politics of the Payments System, rter H. Golembe Associates Monthly Letter, Vol. 1970-9, p. 5:

"... whatever advantages big banks have over small, and they have many, will be further intensified as the cost realities of high volume automation begin to show."

[14] See also *Philadelphia National Bank, supra*, 374 U.S. at 361; *ited States v. Crocker-Anglo National Bank, supra*, 277 F. Supp. 170 n. 29.

been measured in terms of the State of New Jersey, as the FDIC here advocates, rather than in Phillipsburg and its environs. While there is nothing prohibiting the FDIC from analyzing bank acquisitions in the widest possible geographic area if it so chooses (and it needs no assent from this Court to do so), we do not understand the appellant either in this case or on other potential competition cases since *Crocker-Anglo, supra*, to contend that state boundaries establish the appropriate limits within which to measure under the Clayton Act the possible effects of a proposed merger.[15]

II.

THE CRITERIA SUGGESTED BY THE FDIC FOR IDENTIFYING POTENTIAL ENTRANTS ARE SUBJECTIVE. TESTIMONY OF BANKS AND GOVERNMENT REGULATORY OFFICIALS IS RELIABLE EVIDENCE IN EVALUATING SUCH CRITERIA.

The FDIC argues for the adoption of so-called "objective" criteria in evaluating the likelihood of a particular bank or bank holding company entering a local market *de novo*. A review of the suggested criteria, however, shows many of them to be subjective–*i.e.*,

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[15] We understand appellant to refer in its argument (App. Br. 23-28) to a possible statewide concentration of banking resources solely to show that there are few potential entrants into Greeley, thus making "even greater" the alleged "anti-competitive effect of an acquisition that eliminates a significant potential banking competitor . . ." (App. Br. 23). In any event, the evidence on this issue in the district court (see, *e.g.*, DX2) appears to support a contrary conclusion, thus making this record an inappropriate vehicle to support the Court's adoption of an entirely new standard for the relevant geographic banking market.

matters of opinion and judgment. Moreover, the FDIC argues that the testimony of the persons most experienced in making such judgments should be viewed as inherently unreliable and not a permissible basis for the district court decision. It is clear, however, that such persons are more qualified than anyone else to testify on the criteria suggested by the FDIC, and that the district court must hear and weigh their testimony.

A. The Suggested "Objective" Criteria for Determining Likelihood of Entry Are Actually "Subjective."

In evaluating the capacity of a firm to enter a market and the attractiveness of that market, the FDIC suggests that the following factors, *inter alia*, be considered: managerial resources, experience, the vigor of competition likely to be encountered, and the area's growth potential and prospects. (FDIC Br. 7). Appellant similarly urges consideration of the economic incentive to enter a market, the reasonable prospects for successful entry, and the acceptability of entry to prudent management. (App. Br. 30). Both FDIC and appellant label these criteria "objective." All these suggested criteria, however, are matters upon which reasonable men could have differing opinions. Labelling such criteria as "objective" rather than "subjective" is a meaningless exercise in semantics. It is clear that expert testimony is needed on each of these suggested factors.

B. Bank Officials Are the Most Competent Witnesses to Testify as to the Bank's Incentive for De Novo Entry.

The FDIC also raises questions of evidence in applying its suggested criteria. It asserts that these matters "... should not be resolved on the basis of expressions of present management intentions." (FDIC Br. 9). Likewise appellant suggests that the district court's determination of potential *de novo* entry "... cannot depend upon management's stated economic preferences as between independent entry and entry by acquisition ..." (App. Br. 36). These arguments, which would prohibit the district court from relying upon such testimony, are in effect no different from the now discredited exclusionary rule prohibiting a party in interest from testifying as to his intent. See II Wigmore, Evidence, §581 (3rd ed. 1940). This Court at least as early as 1909 rejected such an exclusionary rule. *Crawford v. United States*, 212 U.S. 183, 202.

The appellant's brief itself illustrates why such testimony is critical to the district court. Appellant states: "Decisions must be made by bank executives in light of the most immediate profit advantages to their banks ...." (App. Br. 30). Similarly appellant refers to the "economic incentive" to enter a new market, and to the announced policy of appellee First National Bancorporation to expand so as to "generate the highest profits to shareholders." (App. Br. 30, 31, 33). These factors bear heavily on the ultimate test suggested by appellant: "... whether, considering all the circumstances, independent entry in the future is a reasonable choice for prudent management ...." (App. Br. 36). The bank officials involved have knowledge of all the factors bearing on this question, and their interest in maximizing

the firm's profits makes them more qualified than anyone to testify. Indeed, appellant admits that bankers already in the market place " . . . will not be aware of the relative profit advantages to an outside firm that bear on management's determination whether to enter independently, or by acquisition, or not to enter at all." (App. Br. 32).

In disputing the use of testimony by bank officials, the FDIC argues that the self-interest of bank management favors " . . . amalgamations that may be the least desirable from the standpoint of encouraging the greatest public choice of banking alternatives . . . . " (FDIC Br. 10). Appellant similarly urges that " . . . . their business judgments do not depend on preserving the industry structure that is most likely to encourage competition." (App. Br. 30). Even if true, these arguments do not support the contentions that testimony of management officials as to the business desirability of a different course of conduct, independent entry, should be disregarded. Just because independent entry may be viewed by some lawyers, economists, or even courts as lawful and more competitive does not assure that prudent management will evaluate the firm's "capability," the market's "economic incentive" and the "reasonable prospects for making such an entry successful" so as to opt for *de novo* entry.

All that is really involved on this testimonial issue is a question of balancing evidence; a question of the sort usually left to the district court. *Guzman v. Pichirilo*, 369 U.S. 698; Fed. R. Civ. P. 52(a). The various so-called "objective" factors listed by the FDIC and the appellant as favoring independent entry presumably were available in the district court for cross-examination of the manage-

ment testimony which appellant finds so damaging. After this opportunity for cross examination, the district court found the sworn testimony presented by appellees to be "uncontradicted." (J.S., App. A, p. 49). It remains only to be said appellant relies on what it considers to be favorable subjective testimony by bankers,[16] and that this Court apparently has approved the practice.[17] In short, the district court may receive and rely upon the testimony of bank officials to the same extent as any other competent evidence.

C. The Intent of the Chartering Authorities Is Conclusive on the Question of Entry, and the Evidence in this Case Established that Intent.

The FDIC argues that the intent of the bank chartering authorities not to authorize *de novo* entry should not be treated as "conclusive." (FDIC Br. 11-12).

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[16]Appellant cites with approval the subjective testimony of the President of the State Bank of Greeley (App. Br. 52); a banker in Greeley (App. Br. 54, n. 49); the testimony of the President of the Security National Bank (App. Br. 59, n. 56), and a banker in Greeley (Jurisdictional Statement, 18, n. 23).

[17]In *United States v. First National Bank*, 376 U.S. 665, 669, the Court apparently relied upon "... testimony in the record from three of the four remaining banks that the consolidation will seriously affect their ability to compete effectively ...." In *Penn-Olin, supra*, the district court on remand heard testimony as to the management's intentions. Other district courts in banking cases also have relied upon such testimony. *United States v. Crocker-Anglo National Bank, et al.*, 277 F. Supp. 133 (N.D. Cal.); *United States v. First National Bank of Jackson, et al.*, 301 F. Supp. 1161 (S.D. Miss.); *United States v. First National Bank of Maryland, et al.*, 310 F. Supp. 157 (D. Md.) *United States v. Idaho First National Bank, et al.*, 315 F. Supp. 261 (D. Idaho).

Appellant, referring to the only evidence on this subject, suggests that "There is serious question whether the evidence of the Regional Administrator of National Banks is admissable on such a question." (App. Br. 41). Consideration of these contentions must begin with the indisputable proposition that: "Entry is, of course, wholly a matter of governmental grace." *Philadelphia National Bank, supra*, 374 U.S. at 367 n. 44. One may reach a favorable conclusion on all of the criteria which the FDIC includes in bank "capacity" and market "attractiveness," and even assume a stated willingness of management to enter the market independently; the bank still cannot be considered a potential entrant unless plaintiff demonstrates to the court a "reasonable probability" (see p. 11, *supra*) of regulatory approval. [18]

This distinction between banking and non-regulated industries was noted by the court in *United States v. Crocker-Anglo National Bank*, 223 F. Supp. 849, 859 (N.D. Calif., three judge court):

> In this case there is another special circumstance which makes *proof* of probable prospective competition by Crocker-Anglo through establishment of *de novo* branches in the Los Angeles area well-nigh impossible. Unlike a grocery chain or a hardware merchant or a steel manufacturer who can establish new outlets or plants where he wishes, Crocker-Anglo cannot establish a branch bank anywhere without approval of bank supervisory authorities. Whether the Comptroller would permit the establishment of sufficient branching in this area is so uncertain as further to throw this whole question into the field of speculation . . .

[18] Conducting an unauthorized banking business in Colorado is punishable by fine and imprisonment. Colo. Rev. Stat. 1963 Sec. 14-12-1 (1969).

Similarly, the court in *United States v. First National Bank of Jackson*, 301 F. Supp. 1161, 1199 (S.D. Miss. 1969)[19] held:

> It goes without saying that in the absence of permission from the appropriate regulatory authority, namely the Comptroller of the Currency, a national bank may not branch *de novo. A denial of such permission absolutely removes an applying bank as a potential de novo entrant into a market area*, at least until such change of circumstances as to warrant a reconsideration by the Comptroller. Thus *all firms can be excluded as potential entrants whose request for entry would be denied, because it is impossible to be a potential entrant if the appropriate permission therefor is not forthcoming.* (Emphasis supplied.)

Indeed, in the *Jackson* case plaintiff's own witness testified that one of the criteria " . . . to identify all likely potential *de novo* entrants . . . " was " . . . the legality of entry . . . . "[20]

In advocating its position, the FDIC speaks from the limited viewpoint of an agency whose approval is not required for new bank charters[21] and whose responsibility in the branching area is limited to ratification of state action. The Comptroller has full responsibility in both areas, as well as with respect to mergers, and must be guided by the Congressional

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[19] Neither of these cases, nor any other case involving similar district court holdings (See, n. 17, p. 22, *supra*), were appealed to this Court.

[20] Transcript of trial at 285, testimony of Dr. Elizinga.

[21] Newly chartered national banks receive FDIC insurance upon the Comptroller's certification. 12 U.S.C. 1814. Newly chartered state non-member banks may apply to the FDIC for insurance. 12 U.S.C. 1815.

objectives in statutes relating to new banks and branches. An example will demonstrate the problems involved. Suppose National Bank (A) applies for permission to establish a branch in a new market. The Comptroller, after full consideration of all relevant facts, makes the judgment that the new market will not reasonably support another branch and therefore, as is required under the law, denies the branch application. Subsequently, Bank (A) applies for permission to merge with Bank (B), which is located in that same new market. If the Comptroller should deny the merger application on the grounds of availability of the branching alternative, what would be the likely reaction of a reviewing court to an appeal based on the proposition that—either in the branch case, the merger case, or both—the Comptroller had been arbitrary and capricious? It would seem clear that the Comptroller would not be heard to say, in the one case, that the branching alternative is open, and in the other that it is closed. Could he conscientiously deny the merger proposal on the ground that, although he does not presently feel that a branch in the new market would be in the public interest, he might change his mind in the future or his successor might feel differently and that these possibilities ought be preserved? Should he, in the interest of uniform standards, deny the merger on the grounds that a court, at the instance of the Department of Justice, might disagree with his experienced view on the capacity of the market to support a *de novo* branch? Or ought he suggest that Bank (A) could convert to a state charter, on the supposition that the state supervisor might feel more favorably disposed toward a branch, and that possibility ought be preserved. If, as we believe, the Comptroller could not properly assert any of these positions, then he should not deny the merger on the

grounds that the applicant is a potential entrant through *de novo* branching.

The FDIC suggests that this Court should ignore the opinions of state regulatory officials as to the likelihood of their issuing a *de novo* charter because state banking laws focus on a bank's prospects for successful operation, and such a focus is at odds with the underlying purposes of the federal antitrust laws. The Comptroller has previously made an analagous contention with regard to the applicability of similar state laws to national bank branching. In 1971, for example, the Comptroller approved a branch of Wachovia Bank and Trust Company, N.A., to be established in Hickory, North Carolina, reasoning in part that " . . . the additional competition will stimulate the existing banks to maintain and improve their services in an effort to maintain their market shares" (*infra*, p.41a), and that " . . . Wachovia is a statewide bank which ought to be permitted a branch in a town of industrial importance such as Hickory" (*infra*, p. 42a). (Opinion reproduced in full in Appendix A). The Comptroller believed that such considerations, based upon federal antitrust policy, made it unnecessary for him to consider a possibly inconsistent state law requirement that the branch ". . . meet the needs and promote the convenience of the community . . . " (*infra*, p. 38a). However, the courts rejected the Comptroller's contention and held that the state statute was indeed applicable to national bank branches, citing this Court's decisions in *First National Bank of Logan v. Walker B. & T. Co.*, 385 U.S. 252; and *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, and thus overturned the Comptroller's decision. See *First National Bank of Catawba County v. Wachovia B. & T. Co., N.A.*, 325 F. Supp. 523 (M.D. N.C.), *aff'd. per curiam*, 448 F.2d 637 (4th Cir.).

Thus the FDIC's suggestion that the courts can safely ignore the testimony of state regulatory officials, whose job it is to execute such state statutes, is without foundation. As illustrated by the Comptroller's experience in the *Wachovia* case, the entire framework of federal and state regulatory laws–including restraints on *de novo* entry as well as on branching–is designed to limit competition to a certain extent in order to assure profitable, and thus sound, banks. This Court noted in *Philadelphia National Bank, supra*, 374 U.S. at 328, that under existing statutes:

> A charter for a new bank, state or national, will not be granted unless the invested capital and management of the applicant, and its prospects for doing sufficient business to operate at a reasonable profit, give adequate protection against undue competition and possible failure.[22]

Unless the FDIC is prepared to argue that state regulatory statutes which restrict banking competition are void as being in conflict with federal antitrust laws, and therefore to be ignored by courts and regulatory officials, it must concede that these statutes are in effect and applicable. That being so, *de novo* entry may be as justly precluded by such laws as it might be for any other lawful reason. The bank or bank holding company involved still cannot be a potential entrant without regulatory approval.

Once the necessity to demonstrate probable regulatory approval is established, then the only question is the form

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[22] Thus the considerations in chartering a new bank are not limited, as appellant seems to suggest, solely to a survey of existing banks for serious financial problems or possible failure. (App. Br. 44).

in which such evidence may be presented. Here we agree with the statement of the FDIC that (FDIC Br. 7-8):

> Each federal bank supervisory agency has experience with applications for *de novo* entry into new markets by banks under its supervision, either by the establishment of branch offices or by the establishment of newly-chartered affiliates. Each agency has, therefore, some expertise regarding the characteristics of banking markets which attract efforts at entry and as to the capacity of individual banks or banking organizations to effect entry into a given market by means other than a proposed acquisition.

In view of this obvious expertise, we are at a loss to understand appellant's reservations over the admissability of expert opinion from the regulatory agencies, (App. Br. 41).

Both the FDIC and the appellant offer various reasons why oral testimony of regulatory officials should be discounted, such as possible changes in the statutes, in regulatory personnel, or in economic conditions. Appellant suggests (App. Br. 41) the testimony given here by the Regional Administrator of National Banks is " . . . an 'advisory opinion,' not based on concrete facts presented by a specific application,"–although appellant does not suggest how such testimony is based on any fewer facts than the testimony of other expert witnesses presented at trial. Such considerations seem to us to be a part of the evidence-weighing process engaged in by trial courts and normally not disturbed on appeal. *Guzman v. Pichirilo, supra*. We would suggest only the caveat that the Clayton Act deals with what is "reasonably probable," and most of

the factors suggested by the FDIC and the appellant seem highly speculative. Finally we reject as totally unwarranted and unsupported by the record the suggestion of appellant (App. Br. 41-42) that the Regional Administrator of National Banks, an officer of the United States, was subject to pressures which would affect his testimony under oath before the district court.

CONCLUSION

The banking agencies have authority to deny acquisitions which do not violate the Clayton Act. There is therefore no need to establish any special Clayton Act parameters in a bank case at the request of the FDIC.

Appellants' and FDIC's listing of applicable criteria are no more "objective" than those emphasized by the Comptroller. The agencies and District Courts must weigh the testimony of bankers and regulators with regard to their present and future intentions. The testimony of incumbent chartering officials that they would not charter new entrants in a particular area is conclusive evidence against the probability of such new entries within the meaning of the Clayton Act.

The relevant geographical area in potential competition bank merger cases should be construed by the courts realistically. Although the FDIC is free to do so if it wishes, the Clayton Act does not require that the other agencies and District Courts weigh every merger in terms

of possible future effects on geographic areas different from those served by the institutions involved in the merger.

Respectfully submitted,

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I authorize the filing of the above brief.

Erwin N. Griswold
Solicitor General

July 1972

APPENDIX A

NATIONAL BANK OF WESTCHESTER, WHITE PLAINS, N.Y., AND THE FIRST NATIONAL CITY BANK OF NEW YORK, NEW YORK, N.Y.

COMPTROLLER'S DECISION

Application has been filed with the Comptroller of the Currency to merge National Bank of Westchester, White Plains, New York, and The First National City Bank of New York, New York.

The First National City Bank, one of the nation's outstanding institutions, is the second largest bank in New York, and the third largest in the nation. It had on September 27, 1961, total resources of $7,952,198,366.49. It operates 85 branches in New York City, and three in Nassau County, as well as 79 foreign branches. It has received approval to establish two branches in Westchester County, one in Eastchester, and one in Harrison. Neither of these is open or expected to be open for some time. Thus it presently has no branches operating in Westchester County.

National Bank of Westchester, White Plains, is the second largest bank in Westchester County. It had on September 27, 1961, total resources of $271,214,235.91. Its main office is in White Plains, 29.3 miles from New York City. It operates no branches in New York City. The largest bank in Westchester County is County Trust Company, with total resources on September 27, 1961, of $541,351,126.49. It has 41 branches, all of them in

Westchester County. In addition to these two, there are 7 other commercial banks with main offices in Westchester County of which the smallest is First National Bank of North Tarrytown with total resources of $14,973,388.39. It operates only in North Tarrytown and has no branches. In Westchester County there also is a branch of Bank of Commerce of New York in Yonkers, and a branch of Chemical Bank New York Trust Company in Eastchester. Approval has been granted for the establishment of a branch of Chase Manhattan Bank in Hartsdale, but this branch is not yet open.

New York is, of course, the largest metropolitan area in the nation, with a population in excess of 10.5 million. The City itself has a population of 7,781,984. It has a number of very large banks vigorously competing for local business as well as for national and international business. It is perhaps the most intensely competitive banking market in the nation.

Westchester County is immediately north of and contiguous to New York City. According to official census publications it is a part of the New York metropolitan area. It has an area of 435 square miles, with a population of 808,891. It has a density of population of 1,859.5 persons per square mile, but a large proportion of the population is concentrated in a number of cities in the southern portion of the county adjacent to New York City. These include Yonkers, with a population of 190,634, New Rochelle with a population of 76,812, and Mount Vernon with a population of 76,010.

If this merger should be approved, and if there should be approved the establishment and operation by The First National City Bank of New York of branches at the sites of the main office of the National Bank of

Westchester, and of each of its branches, The First National City Bank would thereby acquire 26 offices in Westchester County, out of a total of 110 commercial bank offices therein.

The commercial banks in Westchester County with their total resources and number of branches are:

Title and location	*Total resources*[1]	*Branches*
"The Gramatan National Bank and Trust Company of Bronxville," Bronxville, N.Y.	$19,365,205.69	1
"Northern Westchester National Bank, Chappaqua," Chappaqua, N.Y.	19,194,324.46	4
"The First National Bank of Mount Vernon," Mount Vernon, N.Y.	52,453,485.63	3
"First Westchester National Bank of New Rochelle," New Rochelle, N.Y.	86,390,033.13	13
"The First National Bank of North Tarrytown," North Tarrytown, N.Y.	14,973,388.39	0

[1] As of Sept. 27, 1961.

"Scarsdale National Bank and Trust Company," Scarsdale, N.Y. . .	37,687,642.78	3
"National Bank of Westchester, White Plains," White Plains, N.Y.	271,214,235.91	25
"First National Bank in Yonkers," Yonkers, N.Y.	84,971,401.93	9
"County Trust Company," White Plains, N.Y.	541,351,126.49	41

We find ourselves with heavy responsibilities in reaching our decision in this case. We must decide whether this merger is in the public interest, and that decision must be made under the provisions of Section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), in the light of six significant statutory factors.[1] These factors are the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and the effect of the transaction on competition (including any tendency toward monopoly). We regard it as our duty to give the broadest possible significance to each of these factors in order that our decision may truly be in the public interest.

Of critical significance in this case are the convenience and needs of the communities involved and the effect of the merger upon competition (including any tendency toward monopoly).

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[1]The seventh statutory factor, whether corporate powers are consistent with the purposes of the Federal Deposit Insurance Act has no significance in the case of national banks whose corporate powers are in every case consistent.

Convenience and Needs of the Community

In connection with this factor we must take into consideration the convenience and needs of each community involved. These include: Westchester County, New York City, the New York Banking District as defined in the application,[2] New York State, the national banking market, and the international banking market. First and foremost, however, is the convenience and needs of the United States. We are charged with responsibility for insuring that our national banking system at all times has the capacity to perform and does perform its vital functions of contributing to the free flow of money, the financing of government, national, state and local, the financing of trade and commerce, national and international, the financing of business and industry, the financing of home purchases, the financing of consumer purchases, and where necessary, the financing of war.

The national banking system must play a vital role in contributing to economic growth. Economic growth is a vital goal of our national economic policy. Achievement of the full potentials for our economic growth requires the most effective functioning of our commercial banking system. It is our judgment that the banking system has not performed in the fashion which is required if this goal is to be attained. We must re-examine, reconsider, and if necessary, revamp our national banking system to insure its adequacy to perform this vital role.

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[2] This includes the counties of New York, Bronx, Westchester, Nassau, Queens, Kings and Richmond.

The vital role of banking in our economy is a prime reason for a NATIONAL banking system. Nearly 100 years ago, after two earlier experiments with single banks, the nation concluded that there was needed, and there was provided, a national banking system. Since that day in 1863 when the National Bank Act was first enacted, the Executive, the Congress, and the Courts have jealously protected that system against encroachment from any source. The courts have stated that, "National banks are national favorites,"[3] and have recognized that national banks are federal instrumentalities, created for public and national purposes.[4] The Congress has often legislated in the interests of the national banking system and to prevent it from being at any competitive disadvantage with respect to state banks, e.g., in the matter of branches. We represent the Executive as our predecessors in office have over nearly 100 years. It is our responsibility, and our responsibility alone, acting within the statutory policies prescribed by the Congress, to preserve and to protect the national banking system, to insure that it has the capacity to and does perform its vital governmental functions, and here specifically to consider whether proposed mergers of national banks are in the public interest, and to decide whether they should or should not be permitted.[5] And so, it is in the light of this

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[3] *Tiffany v. Bank of Missouri*, 18 Wall. 409, 413 (1874).

[4] *Osborn v. The Bank of the United States*, 9 Wheat. 738, 860 (1824); *Van Reed v. Peoples National Bank*, 198 U.S. 554 (1905); *Franklin National Bank v. New York*, 347 U.S. 373 (1954).

[5] The National Bank Act is "A complete system for the establishment and government of national banks." *Cook County National Bank v. United States*, 107 U.S. 445, 448 (1883); *Deitrick v. Greaney*, 309 U.S. 190, 194 (1940).

heavy responsibility that we must examine the proposal before us. We must do so with great care.

The effect of this proposal would be to substitute in Westchester County for the National Bank of Westchester, The First National City Bank of New York. As has been stated, by this merger the latter bank would acquire at once 26 branches in Westchester County. This would be in addition to one other branch for which it has received approval, but which is not yet in operation.[6]

Thus, should this merger be approved, the banking structure in Westchester County would consist of County Trust Company with 41 branches, The First National City Bank with 27 branches, 7 much smaller commercial banks with a total of 33 branches, and three branches of other New York City banks. Of the five largest New York City competitors of The First National City Bank, two would have one branch each in Westchester, with the other three having none. Such an unbalanced banking structure is our major cause for concern in connection with this merger.

It is desirable and in the public interest that New York City banks be permitted to branch in the suburban portions of the metropolitan area. Banks like other businesses should be permitted to follow their customers to the suburbs. As our society changes so must every business desiring to maintain its position and achieve its growth potential change also. One of the serious problems in banking today arises from legal restrictions, many

[6] It has received approval to establish two branches in Westchester, but if the merger should be approved, one of these would be consolidated with a close-at-hand branch of National Bank of Westchester.

of which were designed for an earlier age, which have hampered the proper accommodation by banks to the changing nature of our society, and have inhibited not only their growth, but their ability to serve efficiently our growing economy. Removal of the restrictions on New York City banks branching in Westchester and Nassau Counties shows recognition of these problems at the State level.

The most immediate advantage of this legislation to the public in Westchester and Nassau Counties is the price competition which will result and which to some extent has already resulted from the entry and prospective entry of the New York City banks. On personal loans The First National City Bank charges 4¾ percent discount, including insurance, whereas until very recently the Nassau and Westchester banks charged 6 percent discount, plus insurance, as most still do. The National Bank of Westchester now charges 4½ percent discount, plus insurance, on new automobile loans, 6 percent on personal loans. The Franklin National Bank of Long Island now charges 4¼ percent on new automobile loans, and on personal loans is stated to be competitive with New York City banks. It is not unreasonable to suppose that the entry and prospective entry of the New York City banks were a factor in the decisions of the other banks to reduce their rates. Price competition resulting in lowered rates to the public is a matter of public entitlement and is not without substantial national economic significance, but is consistent with national aims and policy relating to production, employment, and growth.

There are other advantages. The larger banks have experts in very nearly every important line of industry.

The presence of these experts not only enables the larger banks better to evaluate credit in specialized fields, but their knowledge and services are of inestimable benefit to the borrowers. The larger banks are thus enabled to give specialized services of a type not available from smaller banks. This also is to the public advantage.

It is likely also that the needs of small business in Westchester County would be better served as a result of this merger. There is aggressive competition among the larger banks of the country to service the needs of small business, and they do it well. The First National City Bank has pioneered and has been particularly outstanding in meeting the credit needs of and in aiding small business. It remains one of the nation's leaders in this respect. We are aware of criticisms to the effect that only local banks can serve local needs, and that the small businessman is more welcome at the smaller banks than at the larger ones. As a general proposition we are satisfied that this is not true. As was stated at the hearings on this merger, large banks do actually service the needs of small business.[7] Information submitted by the First National City Bank after the hearings and included in the record, concerning its activities in lending to small business, serves to confirm our view that small business in Westchester County would benefit from the entry therein of that bank.

Another considerable advantage which will flow from the entry of New York City banks is the more productive utilization of savings through improvement in the mobility of funds from areas of excess to places where they may be employed to better advantage. This is a point in

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[7] Transcript of Hearing, statement of the Comptroller of the Currency, pp. 197-199.

favor of the merger rather than against it. The First National City Bank quite naturally desires to acquire surplus funds available in Westchester County for use throughout the scope of its operations. We believe there is general awareness of the need to remove impediments which may slow or obstruct the movement of capital to the uses which will contribute most effectively to the nation's economic growth.[8] Capital should not be artificially condemned to inferior uses.

Since we are satisfied that substantial benefits will be derived from the entry of the New York City banks into Westchester County, the crucial question relates to the method by which, and the rapidity with which, access should be permitted. The response to this question depends in turn upon the comparative benefits to be derived from the entry of the New York City banks into Westchester County through gradual entry, as contrasted with the more precipitate method proposed here. It depends, finally, upon the effect of large-scale entry by merger on the banking structure of Westchester County.

It is our view that these substantial benefits will more desirably be made available in Westchester County through the establishment of de novo branches. We believe that large scale entry by this merger would cause an unreasonable distortion and dislocation in the present and future banking structure of Westchester County not consistent with the public interest according to the standards set forth in the Federal banking laws, particularly the so-called Bank Merger Act.

There is no doubt that the larger New York City banks are today actively seeking out acceptable branch sites in

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[8]Transcript of Hearing, Colloquy between Mr. Arthur Roth and the Comptroller of the Currency, pp. 153-155.

Westchester and Nassau Counties. Gradually, as the population shifts to what are now the lesser populated sections of the county, acceptable branch sites will be located, supervisory approval secured, and branches established. Already two of the larger New York banks have one branch each on Westchester, and The First National City Bank has secured approval for two. It seems likely that these branches, together with other branches which will be approved and established, will supply the competitive pressures necessary to bring the interest rates charged in Westchester more closely in line with those now charged in the intensely competitive New York City area. There is some evidence that this is already transpiring. As stated above, both National Bank of Westchester and County Trust Company in Westchester, and Franklin National Bank in Nassau, have to some extent lowered their interest rates. It may be assumed that these reductions were the result of developing competitive pressures, actual or anticipated.[9]

Since it appears that the competitive capacity of New York City banks is already making its influence felt on the loan-rate structure of Westchester, it may be concluded that the convenience and needs of that area in these terms will be served effectively through de novo branches, and without the merger.

There is no substantial evidence before us of failure to meet adequately the convenience and needs of the public of Westchester County in respect to matters other than interest rates on loans. It is generally agreed that there

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[9] There are presently pending before the Board of Governors of the Federal Reserve System two mergers involving proposed acquisitions by large New York City banks of banks in Nassau each with a number of branches.

exists no lack of lending capacity there; it is indeed a funds-exporting area. There was testimony at the Hearing that all commercial banks in Westchester were paying the maximum rate of interest on savings deposits permissible under Regulation Q of the Board of Governors of the Federal Reserve System. No price competition, of course, is allowed for demand deposits. The improved and enlarged services which might be expected from the merger will come to Westchester County through the branches of the New York City banks which may now be anticipated. It appears, therefore, that approval of this merger is not warranted or required by a consideration of the critical question of the convenience and needs of Westchester County.

We attach serious implications to the prospective dislocations in the banking structure which we believe would result from this merger. There are two principal considerations: elimination of the National Bank of Westchester as a separate entity; and the markedly superior position which The First National City Bank would acquire over the other New York City banks in securing banking business in Westchester County.

The National Bank of Westchester is a large, well-managed bank with its branch offices strategically located at various points in the County. If it now is eliminated, it will forever cease to exist. We are convinced that from a longer-range viewpoint the elimination of this bank will have harmful effects, in terms of the public interest. It now has total resources in excess of $250 million. Located, as it is, in a rapidly growing portion of the largest metropolitan area in the nation, and with other factors favorable to its growth, its continued success seems assured. It is therefore our view that the continued

existence in Westchester County of this bank outweighs any immediate benefits to be gained through this merger. Should this merger be approved, there would remain in Westchester County, aside from the New York City banks, County Trust Company with assets of more than $500 million, and a number of smaller commercial banks none as large as $100 million in size. Of the New York City banks, one would have 27 branches in Westchester County, while none of the others would have more than one branch. This would leave County Trust Company as the only really effective competitor of the New York City banks in Westchester.[10]

In contrast, should this merger be disapproved, there would continue to be two large banks serving Westchester County, both well able to service the convenience and needs of the County, and there would be preserved a reasonable equality-of-opportunity for entry into Westchester County of all New York City banks. Clearly, this offers the more hopeful prospect of developing and maintaining there a viable and balanced banking structure under the banking laws.

These considerations appear to us to be of paramount importance, and indicate that the merger should be disapproved. It is thus our judgment that entry of New York City banks into Westchester County should be by branches, now permitted under New York Banking Law, and not through the proposed merger. We reach this judgment because of our concern that the proposed merger would produce serious distortions and dislocations, and so that the evolution of banking facilities in

[10]The smaller banks could, of course, and no doubt would, continue to grow; they could also provide effective competition, but only to the limits of their resources.

that area may be observed and controlled in the best interests of the communities involved and of the banking system.

The smaller banks in Westchester County, to the extent that they are able properly to service the needs of their respective communities, should be given the opportunity to grow and to prosper. It is our view that a balanced banking system consisting both of small banks and of larger banks is more desirable than one consisting solely or primarily of large banks or of smaller banks artificially protected from vigorous competition. While small banks can and do grow in competition with larger institutions, with unique benefit to the commercial banking system as such, approval of this merger could well beget an unbalanced banking structure depending primarily on larger banks, just as denial of substantial–if gradual–entry of the New York City banks could beget an unbalanced structure where large segments of the population would have to rely on smaller banks enjoying economically unjustifiable protection merely because of size.

If, as a matter of sound banking policy, the New York City banks are allowed to compete equitably for acceptable branch sites in Westchester County, this policy will itself lead to vigorous competition, with no one bank having an excessive advantage over the others. As the New York City banks enter that County, even though on a gradual basis, the banks now there, including County Trust Company and National Bank of Westchester, will find themselves under a constraint to meet the new competition. This competition will insure to the public the substantial benefits of one of the fruits of our system. There is no doubt that both of these latter-named banks are well able to compete domestically on a substantially

equal basis with the largest New York City banks. The outcome will be in the public interest.

If entry is to be limited to the more gradual establishment of branches, as will be required under this decision, the banking authorities will be better able to observe and determine whether the desired effects in terms of price competition and in other material respects are being achieved. We shall maintain our interest in seeing that the banking needs of Westchester County are adequately and properly served, and that the banking public has the benefits which are expected of vigorous competition.

At the present time, rates in Westchester County and in Nassau County are substantially higher than those charged for comparable loans by the larger New York City banks. This results in some degree from the fact the banks in these counties have in the past been protected by State laws from competition. Some of the banks in these Counties will continue to be protected by the Home Office Protection Law of the State.[11] We shall observe closely the situation in the cities where this rule applies.

If it should develop that the public interest does require entry on a substantial scale of branches of New York City banks, such entry will be authorized where legally permissible. Similarly, adequate and competitive servicing of the banking needs of the County by existing banks will determine our policy in granting new bank charters.

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[11]Section 105 of the New York Banking Law.

Effect of the Transaction on Competition (Including Any Tendency Toward Monopoly)

This is an issue charged with emotionalism and characterized at the present time by an almost complete lack of clarity and objectivity, brought about in part by an indiscriminate use of conceptual terms. There has to our knowledge been no adequate study of bank competition or the standards by which the effects upon competition of bank mergers should be measured. The nature of commercial banking and the regulatory framework under which it operates distinguish banking from the type of industrial enterprise to which the general antitrust laws were designed to apply, and render highly questionable for judging bank mergers the concepts developed in the application of those laws to industrial corporations. For example, there are geographical limitations upon the expansion of banks which place ultimate limits upon their possible growth. There is also to some extent federal regulation of the supply of money which is the raw material of the commercial banking business. This is a factor in limiting the growth of banks since a bank which prospers cannot, as an industrial corporation might do, purchase additional raw materials and increase productive capacity in order to grow. A bank can acquire more loanable funds only by generating additional deposits, a considerably more difficult undertaking than merely purchasing more supplies and producing more goods, and one which is subject to influences other than management decision. We believe it to be incumbent upon the bank supervisory agencies to institute studies aimed at developing proper standards to insure adequate competition in banking. It is the banking agencies alone that have the facilities, the background knowledge, the constant concern with the adequacy of banking to serve the

financial needs of government and of industry, as well as the understanding of the monetary and fiscal policies and problems of the nation necessary to adequate consideration of this matter.[12] We have stated publicly that we shall institute such studies both internally and through the appointment of an advisory committee.

Moreover, under the so-called Bank Merger Act of 1960 (Section 18(c) of the Federal Deposit Insurance Act), the banking agencies have the ultimate responsibility for the determination of the effect upon competition of bank mergers, and for the preservation of effective but sound competition in banking. Their determinations, however, must, as the Congress wisely recognized in enacting the statute, be based on much broader considerations than competition alone.

We are unimpressed with the arguments presented to us that this proposed merger will have such an adverse effect upon competition as to require our disapproval. There have been no serious arguments presented to us that this merger would substantially lessen competition, and there is no evidence before us to support a conclusion that it would.[13] Such competition as the

[12] "Both managers and examiners of financial institutions should always bear in mind the role of our financial institutions in promoting economic growth." The report of the Commission on Money and Credit, p. 175.

[13] The Federal Reserve report states that there is a "significant" amount of competition between the two banks, which would be eliminated. Neither the Department of Justice nor the Federal Deposit Insurance Corporation in its report to us on competition stated that there would be a substantial lessening of competition. In a supplemental letter addressed to us in response to our request for clarification of some aspects of its original report, the Department of Justice in support of its contention

evidence indicates there may be between the applicant banks is not significant when considered in the light of the total competition existing in the areas in which the banks operate. We find that there would be no substantial lessening of competition resulting from this proposed merger.

It is urged upon us that this merger will result in a tendency toward monopoly. In order to find a tendency toward monopoly we must find that by this merger The First National City Bank would have moved measurably closer to the monopoly power of being able to control prices or to exclude competition.[14] First, however, there must be determined "the area or areas of existing effective competition in which monopoly power might be exercised."[15] The area chosen must constitute "a single area of effective competition among commercial banks."[16]

No one has suggested or could seriously suggest that this merger would create a tendency toward monopoly in the New York Metropolitan area. On the contrary, it is urged that the effects of this merger must be measured in Westchester County alone. We agree that whatever competitive impact this merger would have would be in

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that Westchester County is the relevant market area for this merger, urged that the Westchester banks are not in competition in an important way with New York banks.

[14] *Transamerica Corp. v. Board of Governors*, (C.A. 3, 1953) 206 F.2d 163, cert. den. 346 U.S. 901.

[15] Ibid., p. 169.

[16] Ibid.

Westchester County, and that there would be no impact to any significant degree elsewhere. It seems to us doubtful that a single portion of a large metropolitan area could realistically be regarded as constituting a single area of effective competition among commercial banks either from the viewpoint of enforcing the antitrust laws or of considering the effect upon competition under the Bank Merger Act, particularly when the large metropolitan banks are permitted to establish branches within the area. It is unnecessary for us to decide this question, however, for it is clear that this merger would create no tendency toward monopoly in Westchester County.

In the first place, we have considerable doubt that there can exist effective monopoly power in commercial banking as it operates in this country today. Here again is illustrated the difficulty of attempting to apply to banking antitrust concepts developed in connection with industrial enterprises. There are few other industries subject to governmental regulation and control to the same extent as commercial banking, and in the case of those that are it is usual that they are exempt from the antitrust laws in matters subject to regulation.[17] In the case of banks there are limitations on geographical expansion, there are limitations on the rates of interest which they may pay on time and savings deposits, they are prohibited from paying interest on demand deposits, they are limited by the usury laws in the interest which they may charge on loans;[18] the supply of loanable

[17]A good discussion of the interweaving of the antitrust laws and regulatory laws in connection with regulated industries may be found in *California v. Federal Power Commission*, No. 15687 (C.A.D.C., March 30, 1961), cert. granted, Oct. 9, 1961, 30 L.W. 3102.

[18]National banking associations are probably subjected to as many regulations as any type of institution in this country. For

funds, which is their stock in trade is limited (1) by the amount of deposits they are able to generate, (2) by the

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example, the Comptroller's approval is required for: their chartering, the establishment of branches, mergers, consolidations, purchases of assets, assumption of liabilities, conversion from state into national banks, increases in capital, decreases in capital, stock dividends, dividends exceeding net profits for three years, certain types of borrowing, investment in bank premises in excess of the amount of capital, change of location, change of name, etc. They are subject to regulations of the Comptroller of the Currency regarding investment securities, real estate loans, engaging in the insurance business, acting as real estate broker, making loans on leaseholds, etc. They are subject to regulations of the Board of Governors of the Federal Reserve System with respect to: Reserves required to be maintained against deposits, amount of interest which may be paid on time and savings deposits, interlocking directorates, loans to executive officers, exercise of trust powers, collection of non-cash items, check clearing and collection, the establishment of foreign branches and foreign subsidiaries, affiliate relationships, relationships with dealers in securities, loans secured by registered stocks, etc. They are subject to regulations of the Federal Deposit Insurance Corporation with respect to advertising. They are prohibited by law from: establishing additional offices outside their own states, and in many cases within their own states, engaging in the securities business, underwriting and dealing in special revenue or corporate securities, lending more than a specified percentage of capital and surplus to any one borrower, making loans on real estate except in accordance with statutory requirements, owning real estate other than that necessary to their accommodation in their business, engaging in the banking business with less than a specified amount of capital, purchasing their own shares of stock or making loans on their own shares of stock, borrowing in excess of the amount of their capital, paying interest on demand deposits, charging interest in excess of that permitted by the usury laws, dealing with affiliates except in specified ways, accepting drafts in excess of specified amounts, acting as insurance agent or real estate brokers in towns of more than 5,000, acting as agent for nonmember banks in receiving discounts from Federal Reserve banks, acting as agent of any nonbanking person in making loans on the security of stocks to brokers or dealers, engaging in

reserves which they are required to keep with the Federal Reserve System, (3) by the amount of the total money supply at any given time, and in many other respects. The Board of Governors of the Federal Reserve System has several methods including the setting of reserve requirements and discount rates, and open market operations, which it can and does use to influence the money supply. It is not within the power of banks, as is true of industrial corporations, to increase freely their productive capacity. A bank which attempted to use lower interest rates on loans as a means of driving out competition would very soon find itself without loanable funds.

Whatever the risks may be that monopoly power could be attained in banking, we are satisfied that it could not be achieved in an area such as Westchester County, which is immediately adjacent to the most intensely competitive banking institutions in the nation, and which is open to branching by a significant number of those large and aggressive banks.

In Westchester County there is at the present time County Trust Company, a commercial bank with 41 offices and total resources of more than $500 million. This bank is and can continue to be an able and effective competitor. There is no doubt that a bank of this size and

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business transactions with their directors, except on specified terms, etc. Every national bank is required by law to be a member of the Federal Deposit Insurance Corporation and the Federal Reserve System: it must furnish periodic reports to the Comptroller of the Currency and the Federal Deposit Insurance Corporation upon calls submitted by them; it must submit to semiannual examinations by the Comptroller of the Currency; and its shareholders are subject to assessment for impairment of capital.

efficiency can compete and compete well ll with banks of the largest size, including The First Natioronal City Bank. In addition to County Trust there are otther commercial banks ranging in size from the First Westchchester National Bank of New Rochelle, with total resosources of $86 million, to The First National Bank of Norrth Tarrytown, with total resources of $15 million. Each o of these banks is protected from the establishment of brranches of The First National City Bank in the city in w which its main office is located, by the provisions of Sectction 105 of the New York Banking Law.[19] We have no f fear that these banks will be unable to compete effectivevely even when faced with increased competitive pressures. s. There are also located in Westchester County at the presesent time, two branches of New York City banks, a branch in Yonkers of the Bank of Commerce and a branch in h Eastchester of The Chemical Bank New York Trust Corompany. Under New York and Federal law, New York statate and national banks, respectively, can be authorized to e establish additional branches in Westchester.

The First National City Bank's presesent policy of charging the same rates at all its offices, s, if continued, would restrict its capacity to use its admmittedly great financial resources to achieve a monopolply position.[20] Any change in this policy, if there was any y evidence that it was designed for the purpose either ofof achieving or

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[19]By this merger The First National City Banank would acquire branches in New Rochelle and in White Plains w where are located the main offices respectively of First Westchester N National Bank of New Rochelle and County Trust Company. It would be able to acquire no additional branches in either place becacause of the home office protection law.

[20]Transcript of Hearings, Testimony of Mr. G George Moore, p. 93.

exercising monopoly power, would bring the most intensive supervisory scrutiny.

We find that there is no foreseeable possibility of The First National City Bank acquiring monopoly power in Westchester County, and hence that there would be no tendency toward monopoly resulting from this merger.

Neither do we find that this merger would result in any undue concentration of banking resources in Westchester County. The First National City Bank of New York now has no offices, and hence no resources in Westchester County. The effect of this merger would be to substitute that bank in Westchester County for the National Bank of Westchester. This would result in no change in the concentration of resources in the County. It does not seem to us realistic to take account of all of the resources of The First National City Bank, acquired through its deposits in all of its other offices, in measuring the concentration of banking resources in Westchester County. Moreover, since Bank of Commerce and Chemical Bank New York Trust Company each have an office in Westchester, and The Chase Manhattan Bank soon will, that approach would require including also the total resources of all of those banks, thus obviously giving a greatly distorted view of the banking structure in Westchester County. Any increase in concentration resulting from this merger would have to be appraised in terms of the entire areas in which both banks operate. Viewed in this light, there would be no undue increase in concentration.

Objection has been made to this merger on the ground that the smaller banks in Westchester would find it difficult to compete with the lower rates and better services offered by The First National City Bank. As we

have stated earlier, we have no fear that the smaller banks in Westchester County would be unable to compete effectively if this merger were approved, particularly in view of the home office protection which their main offices enjoy. [21] Even if we thought otherwise, however, we do not believe that this would be a proper basis upon which we could disapprove this merger. The purpose of assuring competition is to bring to the public the best and broadest services at the lowest cost. Only keen competition will insure this result. It seems to us to amount to a perversion of this concept to undertake the protection of small competitors from fair competition by larger competitors, if thereby the public is wholly or partly denied the benefits of competition to which it is entitled. By fair competition we mean competition in the absence of monopoly power, and without predatory purpose. We have concluded above that The First National City Bank could not foreseeably achieve monopoly power in Westchester County, and if the rates charged and services rendered in Westchester County were identical with those offered in New York City, that would be ample evidence that they were not fixed with a predatory purpose. [22]

We have been unable to find any authority, and none has been cited to us, to support a conclusion that there is any national policy to prevent fair competition which may adversely affect some rival firms, and we reject this argument. In response to a specific question from us, the Department of Justice has advised us that "Nothing in

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[21] It is perhaps significant that while each was invited to do so, no commercial bank operating in Westchester County appeared at the hearing in opposition to this merger, and only one commercial bank furnished for the record a statement in opposition.

[22] See footnote 20.

our national policy of free competition protects competitors of any size from the kind of competitive advantages First National City would enjoy in Westchester when such advantages are achieved through normal growth and efficiency," but that "Congress has chosen to close the path to the achievement of such advantages through combinations, mergers or acquisitions where the effect of such combinations may be to substantially lessen competition or tend to create a monopoly or unreasonably restrain trade." Since we are satisfied that the effect of this merger would not be to substantially lessen competition or tend to create a monopoly or unreasonably restrain trade, we are satisfied that considerations of the protection of smaller competitors would not be pertinent to our conclusion with regard to the effect upon competition.

As bank supervisors, we would, of course, be concerned with competition which might lead to insolvency, lack of reasonable earnings, or unsound practices on the part of any bank. This is one of the prime reasons for bank supervision and for requirements of supervisory approval of new charters, branches, mergers, etc. We must not confuse our consideration of banking factors, however, with our consideration of competitive factors. Part of the existing confusion concerning bank competition stems from a failure properly to distinguish banking factors from competitive factors.

One other consideration needs mentioning. This proposed merger was for legitimate business purposes, and no part of the purpose was to eliminate a competitor nor to attempt to monopolize. Having been prohibited by law for more than a century from expanding into Westchester and Nassau Counties, The First National City Bank, as

well as other large New York City banks, quite naturally are anxious to acquire a share of the banking business in those large, expanding areas. Like other business, banks desire to follow their customers to the suburbs. More important considerations, however, are the natural and laudable desires on the part of The First National City Bank to slow the proportionate decline in the volume of its business,[23] to secure additional deposits so the funds can be used in its national and international business, and thus to facilitate the free flow of funds from areas of surplus funds to areas of need. The fastest and most efficient way to accomplish these purposes would, of course, be to merge with another bank having a volume of deposits and a number of offices.

It has been suggested that the desirable results to be achieved by this merger could be achieved also through correspondent relationships. This shows a lack of understanding of the nature of those relationships as well as the basis upon which they exist. Such relationships exist primarily to breach artificial barriers and they result in services to the smaller banks in the nature of tax advice, investment advice, etc., which the small banks cannot easily provide for themselves. These services are compensated for, of course, by deposits maintained with the larger bank. Correspondent relationships are in no sense an adequate substitute for the establishment of branches.

Some of what we have considered under the convenience and needs factor might be pertinent also to the

[23]See comparison of growth in gross national product with growth in commercial bank assets in the merger application, p. 88; and the comparison of growth in gross national product with growth in total assets of the First National City Bank of New York submitted by the bank after the hearing for inclusion in the Record.

competitive factor. However, our primary concern has been with the balance of the banking system in Westchester County, the structure of the system, how best the banking needs of the community can be served, what sizes and types of banks there should be, the number of banks, etc. In our view these are clearly relevant to the banking factors and for determination by the Comptroller of the Currency in the exercise of his supervisory authority over the national banking system, rather than to the competitive factor, of the Bank Merger law, where the primary concern is with lessening of competition or tendency toward monopoly.

We are satisfied that the effect of this merger upon competition alone would not be such as to require its disapproval. If the benefits to be derived in Westchester County from the entry therein of the larger New York City banks could be secured only through this merger, we would have no hesitancy in approving it. We may say that it is our view that there has been a considerable overemphasis placed upon an alleged lack of competition in banking, and an alleged concentration in banking. To the contrary, banking is highly competitive. It is diffuse rather than concentrated, and the smaller institutions by and large are growing at a faster rate than are the largest banks. We find no reason for concern over the future of competition in banking.

Other Factors

We have considered the financial history and condition of the banks involved, the adequacy of their capital structures, their future earnings prospects, the general character of their management, and whether their corporate powers are consistent with the purposes of the Federal Deposit Insurance Act. In our consideration of

these factors we have found nothing to change our views as expressed above. Our action with respect to this merger should in no wise be regarded as any unfavorable reflection whatsoever on The First National City Bank of New York, nor its purposes in submitting this application. This bank is in the very first rank of American financial institutions, and is outstanding in every way.

Conclusion

In view of our conclusions with respect to the convenience and needs of the community involved, we have concluded that this merger should be, and it hereby is, disapproved.

DECEMBER 19, 1961.

OPINION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION OF WACHOVIA BANK AND TRUST COMPANY, N.A., WINSTON SALEM, NORTH CAROLINA, FOR PERMISSION TO ESTABLISH A BRANCH IN THE HICKORY PLAZA SHOPPING CENTER ON U.S. HIGHWAY 64-70, HICKORY, CATAWBA COUNTY, NORTH CAROLINA.

Wachovia Bank and Trust Company, N.A., applied to the Comptroller of the Currency on March 4, 1970, for permission to establish a branch in Hickory, Catawba County, North Carolina. The application was accompanied by a statement of the applicant's board of directors indicating that the Hickory office was desired in order to serve the applicant's existing customers more efficiently and to meet the needs of the growing industries in the area for commercial and corporate banking services. The application was supported by relevant financial and economic data and the usual full field investigation was conducted by a commissioned National Bank Examiner.

There are presently five commercial banks in the City of Hickory. Of these five banks, only the dominant bank in Hickory, The First National Bank of Catawba County (hereinafter "First National") and the Bank of Granite, headquartered in Granite Falls in neighboring Caldwell County, protested the application. In addition to filing written objections, these two protestants also requested a hearing which took place on June 16, 17, 18, and 19, 1970, before a panel convened by the Regional Administrator of National Banks for the Fifth National Bank Region, in Richmond, Virginia. In accordance with the hearing procedures published for the Fifth National Bank

Region, the protestants and applicant were given a full opportunity to present their views on the merits of the application. Seven witnesses appeared for the applicant, ten for protestant First National and one for protestant Bank of Granite. During the hearing numerous documentary materials were received from all the parties and a verbatim transcript was made. In addition, at the conclusion of the hearing all parties were given an opportunity to present supplemental briefs and arguments to the Comptroller.

After considering all of the materials and arguments submitted by the applicant and protestants as well as the information gathered by and the opinions of the Comptroller's staff, the Comptroller has determined that the application of Wachovia Bank & Trust Co. for a branch in the Hickory Plaza Shopping Center on U.S. Highway 64-70, Hickory, Catawba County, North Carolina, should be approved for the following reasons:

Catawba County is located in the northwestern part of the state and has a 1970 estimated population of 90,128. The economy of the county and the City of Hickory is dependent primarily on commercial and industrial activities. The area includes one of North Carolina's largest concentrations of manufacturing concerns, whose principal products are textiles, furniture, electrical equipment and machinery. While there are several nationally known firms represented in Catawba County—including Burlington Industries, General Electric, J.P. Stevens, Kayser-Roth and Drexel Furniture—the bulk of the industry is locally owned and operated. Due primarily to this industrialization, Catawba County has evolved as the trade and commercial center of the so-called Western Urban Complex of the state of

North Carolina consisting of the four counties of Alexander, Burke, Caldwell and Catawba. This four-county region is an integrated and dynamically growing area with Hickory as its principal city. In 1969 Catawba County contained 40.3 percent of the region's total population of 220,006 and enjoyed 55.2 percent of the region's retail sales of over $472 million. In 1968 Catawba County accounted for 49.5 percent of the region's total employment and almost 57 percent of the region's total bank deposits.

Recent growth in Hickory and Catawba County has been significant. From 1968 to 1970 the county's population increased 3.9 percent to 90,128, while Hickory's population increased 7.8 percent. In 1969 the value of residential permits in the zoning districts of Hickory, Newton, Conover, Claremont and Catawba County was $12,731,433, an increase of 8.3 percent from 1968, while the value of all commercial and industrial permits increased 33.9 percent to a value of $7,604,331. Within Catawba County retail sales increased 85.9 percent from 1967 to 1969 to a value of $260,408,105. For the year end 1969 the North Carolina Employment Security Commission reports a total preliminary manufacturing employment of 31,560 for the county, which represents an increase of over nine percent since 1967.

The City of Hickory lies in the northwestern portion of Catawba County. The city itself has a 1970 estimated population of 24,900, while the service area of the proposed branch (which includes most of Catawba County and a small portion of Burke County) has a total population of about 60,000. This service area includes all of the City of Hickory, the towns of Conover, Newton

and Claremont to the east, Longview and a small portion of Burke County to the west, and less populous areas ranging out to Lake Hickory and close to Propst Store to the north and down to Propst Crossroads, Blackburn and Startown to the south.

A strong employment base has provided an effective buying income per household in Hickory substantially higher than that of the state as a whole. Effective buying income per household was $10,958 in 1968, an increase of 6.7 percent from 1967. This value was the second highest in the state among the medium and large-sized cities. The homes in Hickory are above average in quality and are generally owner occupied. A substantial number of homes are valued in excess of $35,000.

Hickory is well served by air and rail as well as highway transportation facilities. It is located at the junction of U.S. Highways 321 and 64-70 and just north of the projected route of Interstate 40. There are more than 50 common carriers, forwarders, consolidators, and truck rental companies in the greater Hickory area. The lines of both the Southern and the Chesapeake and North-Western Railroads pass through Hickory and the Hickory airport is served by regularly scheduled commercial flights. Due in part to its excellent transportation facilities, Hickory has developed into a major trade center for wholesale and retail activity for the four-county area. There are several well-developed shopping centers in Hickory, including one of the largest in North Carolina, Catawba Mall, which was completed in 1968 and contains 26 units. Retail sales have increased significantly, and in 1969 total volume exceeded $179 million, making Hickory the state leader in retail sales per capita. The volume of wholesale trade also has shown a growth rate

far higher than the state average. Economic indicators thus show a strong and increasing demand for banking services in the Hickory/Catawba County area.

Applicant Wachovia Bank & Trust Co., N.A., has chosen the Hickory Plaza Shopping Center on U.S. Highway 64-70 as the location of its proposed branch partly for easy access from areas both within and adjacent to the city and partly to take advantage of the combination of Hickory Plaza and the two other nearby centers which together include some 46 diversified commercial enterprises. Wachovia is the largest bank in North Carolina and the thirty-ninth largest bank in the United States. It is a strong, well-managed bank which had total assets in March 1970 of approximately $1.6 billion and total deposits of $1.3 billion. The applicant has sufficient capital to meet the statutory requirements of 12 U.S.C. § 36(c) and (d) to support its branch structure of 143 branches. In addition, the Comptroller is satisfied that applicant will be able to draw upon its considerable depth of managerial resources and experience in order to staff the proposed branch with capable and experienced bankers.

Within the delineated service area[1] of the proposed branch the applicant already claims over $1.5 million in

[1] Applicant, with its main office in Winston Salem and its nearest branch in the town of Hildebran some 4.5 miles west of its proposed branch site, delineated its projected service area through a geographical distribution of customers in the area now served by its existing offices. Protestant First National, on the other hand, provided three contrasting service area designations based on interviews with customers at five banking offices located near the site of the proposed branch, including three offices in the nearby shopping centers. Upon the basis of its surveys, protestant First National estimated the service area appropriate to the proposed

deposits, $8 million in loans, and 28 trust accounts with an asset value of $10.8 million. While applicant's present business in Hickory is for the most part derived from a relatively few large accounts, it nevertheless represents a substantial base on which to build future growth. In addition, applicant has stated that it proposes to bring to Hickory, through its applied-for branch, not only a full range of customary banking services but also a number of unusual services not presently available in Hickory. Thus, for example, applicant, as the only North Carolina bank with an Edge Act subsidiary, proposes to offer a convenient source of specialized international banking services. In addition, applicant offers an unusual cash management program which is approached in sophistication only by certain programs available for the first time in Hickory with the entry of NCNB in 1969.

Protestant Bank of Granite is a $15.4 million deposit institution headquartered in nearby Granite Falls. It presently operates four banking offices in adjoining Caldwell County and a branch office in Hickory which was approved in 1969 and opened in July 1970. Indeed, this branch largely explains Bank of Granite's opposition to Wachovia Bank and Trust Co.'s proposed entry into an

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branch to be slightly larger than the average area determined for the three shopping center offices, but considerably smaller than the area proposed by the applicant. The nature of the major existing business conducted by applicant in the Hickory area, consisting largely of somewhat specialized shoppers-type financial services, appears to justify an initial primary service area substantially as designed by the applicant. Whether Wachovia would develop a convenience-oriented service area similar to those suggested by First National is doubtful in view of the different types of banking services offered by Wachovia and the different geographical distribution of Wachovia's existing branches.

area described by Bank of Granite as "the dynamic City of Hickory."

Protestant First National is headquartered in Hickory and has long been a dominant force in this banking market. The bank was originally organized in 1891 and at the time of this application operated five banking offices in the Hickory area and five additional offices within Catawba County. It also operates a branch office in adjoining Alexander County. First National's total assets expanded from $55 million in 1964 to $108 million in 1970, while its deposits expanded from $50 million to $98 million over the same period. In 1968 First National held approximately 70 percent of the deposits in Hickory and 63 percent of the deposits in Catawba County, and was the principal bank for an overwhelming 83 percent of Hickory's major employers. This large market share has been maintained in part through the ability and aggressiveness of First National.

Competition in the Hickory area is provided by three other banks with statewide branching systems. The Northwestern Bank, with main offices in North Wilkesboro and system assets of about $486 million, first opened a branch in Hickory in 1947 and has since established additional branches in the city in 1960, 1964, and 1967. First-Citizens Bank & Trust Co., with headquarters in Smithfield and system assets of about $705 million, opened a branch in Hickory in 1962 and has opened additional branches within the city in 1964, 1967, and 1968. The North Carolina National Bank, with headquarters in Charlotte and system assets of $1.3 billion, opened its first branch in Hickory in 1969 and has an additional application pending at this time.

First National also protested the 1969 69 NCNB application, urging that it would suffer r "irreparable" competitive injury from the opening of NCNCNB's branch. Subsequent events, however, have more th than disproved First National's contentions. Since the he opening of NCNB's branch First National has continueued to maintain substantial growth and to expand its branchching activities; it has constructed a new office in Conoonover, received approval for a branch in Newton, and filed ad an application for a branch in Granite Falls. During calendandar 1970, First National's total resources grew from $96 mi million to $108 million, its total deposits from $87 milmillion to $98 million, and its total loans from $60 mi million to $68 million. The bank's net earnings continued ud uninterrupted growth in rising from $580,000 in 1966 to to $793,000 in 1970. At the same time First National offoffered new and better services to its customers in response tœ to increasingly vigorous competition. Thus, with the appapproval of the Comptroller's Office, First National expanpanded its trust services during 1970 with the establishlishment of a Common Trust Fund. And, with the opopening of its Conover office, "The First" brought anothother impressive innovation to North Carolina banking throurough a facility which eliminates the familiar teller line by su substituting sit down teller desks and a comfortable waitinging area for the comfort and convenience of the bank's cliententele.

Protestants acknowledge the strength, rec recent growth, and potential future growth of the Hickickory-Catawba County area and expressly agree that the he applicant is sound and capable. There is no evidence thathat Wachovia's entry will damage the stability of any banksnks in the area. Protestants urge, however, that the Wachachovia branch application be denied by the Comptrollerller principally

because, in protestants' view, (1) there is "no substantial amount" of public support for the proposed branch and (2) existing banks in the Hickory/Catawba County area provide adequate service to the area residents and businesses at the present and will continue to do so in the future.

Protestants have chosen to emphasize their arguments by referring to the portion of the North Carolina branching law which requires the State Commissioner of Banks, before approving a branch application, to find that the branch ". . . will meet the needs and promote the convenience of the community. . .," and that ". . . the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch. . . ." Section 53-62(b), N.C. Gen. Stat. In effect, protestants urge that Wachovia's application does not meet these criteria and that the Comptroller thus is required to disapprove it. The Comptroller, however, cannot, consistent with his statutory responsibilities under federal law, accept protestants' restrictive analysis of the factors which can and should affect his determinations to grant or deny national bank branch applications. The Comptroller finds particularly unacceptable protestants' facile separation of competitive factors from the community needs considered by the Comptroller's Office.

The number and quality of existing banking institutions in the Hickory/Catawba County area lend considerable merit to protestants' basic contention that present banks conveniently serve the community. Indeed, competitive considerations aside, it would appear that the Hickory/Catawba County area has access to convenient banking facilities capable of meeting all present require-

ments with the possible exception of the specialized areas of international banking. Competitive considerations cannot be put aside so easily, however. As the Comptroller has had occasion to point out in connection with several other opinions issued today, the recent history of North Carolina shows a close parallel between the development of the state's economy and the growth of strong state-wide banking systems with their accompanying full range of competitive services. Indeed, the more efficient and diversified banking services which have been brought to the Hickory banking public in the past several years provide an excellent illustration of how an increasingly competitive banking climate can contribute to the economic prosperity of an entire area. Banks in the four-county area likewise have enjoyed reciprocal benefits from increased competition. Total deposits for all commercial banking offices in the four-county complex grew from $164 million in 1966 to $210 million in 1968.

Protestants do not challenge the historical stimulus provided to the North Carolina economy in general and the Hickory economy in particular by increased banking competition. Instead, protestants insist that there is now "adequate" [2] banking competition in Hickory and "no additional competitive stimulation is required." The

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[2] The Comptroller finds the judgment of a protestant bank as to "adequacy" of competition to be suspect at best in light of a history of North Carolina banking checkered with lawsuits brought for no apparent purpose than to delay the opening of a competing bank and even with understandings among "competitors" not to apply for branches in each other's "territories."

market domination retained by protestant First National belies this contention. The mere sufficiency of existing banking facilities, in the sense of some facilities more or less conveniently located in an area and furnishing the usual gamut of services, is not, as protestants seem to believe, in and of itself sufficient basis to warrant disapproval of a branch application.[3] Where, as in Hickory, the general economy of the area and its reasonable potential are such that an additional qualified competitor can offer somewhat different services than existing banking offices or an additional convenient choice of existing services, approval is warranted absent a showing of damage to existing banks. As emphasized by the Comptroller twenty-five years ago:

> The Comptroller is not charged with and does not undertake the enforcement of the antitrust laws, but he is obligated to exercise his discretionary power in the light of the purposes which the statutes in this field were designed to achieve. A monopoly in banking, even more so than in some other activities, is singularly dangerous because of the influence banks exercise over their communities through control of credit.[4]

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[3] Protestants' heavy reliance upon the application of mathematical formulas concerning the ratio of population to banking offices hence is misplaced. Such an approach fails to take into account the market concentration and need for bank competition, growth factors in the community, and the recent expansion by existing banks in Hickory in response to the present and anticipated demands of the banking public. All of these factors are particularly important in this instance in determining whether the approval of an additional banking office is in the public interest.

[4] 83rd Annual Report of the Comptroller of the Currency (1945), p. 4.

The entry of Wachovia Bank & Trust Co. into the Hickory/Catawba County area not only will enable the bank to serve its existing business in this community more efficiently but also will bring another strong and able competitor to the Hickory banking market. While it is by no means assured that applicant will meet with any greater success than the other banks in the community in overcoming the domination of the market by protestant First National, the Comptroller is persuaded that the additional competition will stimulate the existing banks to maintain and improve their services in an effort to maintain their market shares. This competition will assure the community of banking services of the highest quality and help to sustain its present growth. Accordingly, for all these reasons the application of Wachovia Bank & Trust Co. to establish a branch in the Hickory Plaza Shopping Center on U.S. Highway 64-70, Hickory, Catawba County, North Carolina, should be approved.

The effect upon the Comptroller of Section 53-62(b) has twice been considered by the United States Court of Appeals for the Fourth Circuit in *First National Bank of Smithfield v. Saxon*, 352 F.2d 267 (1965) and in *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086 (1969). In *Smithfield* the Court of Appeals concluded that this North Carolina statute "... has not been extended to the Comptroller by the National Banking Act." In the later *First-Citizens* case, however, the Court of Appeals held that "... the Comptroller was bound by North Carolina's need and convenience and solvency of the branch criteria." The court, in reaching this conclusion, underscored "... that neither the North Carolina statute nor any decided cases provides any degree of specificity as to the factors, proof of which would show the presence or absence of 'need and convenience' for a new branch bank."

As suggested by these two contrary decisions, the problem of dealing with the North Carolina "need and convenience" statute is not an easy one. The problem is perhaps compounded rather than simplified because of the vagueness of the terms used in Section 53-62(b) and the probability that this state statute by coincidence includes many or all of the factors always considered by the Comptroller in passing upon branch applications throughout the United States. Indeed, the brief filed on behalf of the Comptroller in the *First Citizens* case noted: ". . . [T]here is no apparent difference in the subject matter inquired into by the Comptroller and the North Carolina authorities. . . ." The Comptroller is dubious, however, that the resolution of this issue should depend upon what a particular state statute happens to say.

The present application, along with several others decided this date, well illustrates this problem. Wachovia is a state-wide bank which ought to be permitted a branch in a town of growing industrial importance such as Hickory. In addition, the recent history of banking in this area has shown that the attempted penetration of the banking market by other state-wide banks has spurred the dominant First National Bank of Catawba County to improve its already fine service. In June of 1969 the Comptroller reasoned in part as follows in approving an application by North Carolina National Bank to establish a branch in Hickory:

> Of particular importance in this instance, the competition resulting from an approval of this application will have a healthy effect on the heavily concentrated banking market in the Hickory area. * * * The entry of North Carolina National Bank will add a strong competitor to the banking market

> and thus should stimulate the existing banks in the community, particularly First National, to improve services even further in an effort to maintain their market shares. [5]

That reasoning is equally applicable here, but it is unclear whether such competitive factors satisfy the North Carolina "needs and convenience" test when, as contended by the protestants, the community already receives fine service from existing banks.

The Comptroller, however, should remain free to take such factors into consideration no matter what the state statute might say. If, as the Fourth Circuit more recently concluded, the Comptroller is "bound" in approving branches by state statutes concerning economic factors, a state could just as easily preclude the Comptroller from considering a community's need and convenience. Such an untenable result is not at all hypothetical. There have been times in the last century when the so-called "free banking" statutes of various states were interpreted to require the State Banking Commissioner to approve any application for a new bank presented to him in proper form, regardless of the opinion the commissioner might have about the need for a bank or the character of the applicant. In Illinois today a state bank may establish a teller's window within certain geographical restrictions

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[5] First National of Catawba County also protested that application, making essentially the same arguments it makes here. First National filed suit in the federal district court before the Comptroller had even acted on that application, and obtained a preliminary injunction the effect of which was to delay the opening of North Carolina National's branch, should it be approved. The Comptroller did approve the application, and First National voluntarily dismissed its lawsuit.

without the approval of the Director of Financial Institutions; national banks in Illinois, however, must and do apply for the approval to establish a branch, and the Comptroller in granting and denying that approval considers the same factors that he considers in passing upon branch applications arising from North Carolina or from any other state. Similarly, in Kansas a state bank may establish a limited services banking facility subject to prescribed geographical limitations, without obtaining the approval of the Bank Commissioner; as in Illinois, national banks must apply for and receive the Comptroller's approval to open such a branch, with approval granted or denied based upon the same considerations involved in such determinations in other states. In New Jersey a state bank may interchange its main office with any of its branches, thus establishing a branch at the former main office site, without obtaining the State Banking Commissioner's approval; a national bank similarly situated, however, requires the Comptroller's approval under appropriate economic or other criteria. In each of these instances the state banking authorities are effectively precluded from considering the "needs and convenience" of the community, yet the Comptroller in considering applications by national banks can and has considered the same economic and banking factors he considers in passing upon similar applications from national banks located in other states. These factors are largely embodied in the application and investigation forms completed by the applicant bank and by a national bank examiner, and, through the questions thus asked, the Comptroller—for a period of almost forty years—has been seeking and relying upon the same types of information in passing upon every branch application submitted by national banks from Alaska to Maine. Thus

the issue is not whether the North Carolina statute is broad enough to cover the factors usually considered by the Comptroller, but whether any state has been given the power to limit the Comptroller's ability to consider economic and similar criteria in approving or disapproving branches. There are a number of reasons why this power has been denied to the states.

First, the general pattern of the federal banking statutes with regard to the authority of the Comptroller as to other matters affecting the banking structure such as the chartering of new national banks under 12 U.S.C. §§ 26 and 27, and the approval of bank mergers under 12 U.S.C. § 1828(c), has not been made in any way to depend upon state-created economic limitations. There is no reason to suppose that Congress intended such a drastic departure from this pattern with regard to the Comptroller's authority over national bank branching. Indeed, the strong implication is to the contrary.

Second, the National Bank Act requires only the Comptroller's "approval" with respect to national bank branch applications and–outside of the capital requirements and the location restrictions of state statutes–imposes no explicit restrictions or direction upon the Comptroller as to those matters which he may consider, in his discretion, in granting or denying such approvals. "An examination of congressional legislation with regard to banking since 1864 shows that Congress has consistently used the word 'approve' in the sense of conferring discretion upon the Comptroller of the Currency, the Secretary of the Treasury or the Federal Reserve Board." *Apfel v. Mellon*, 33 F.2d 802, 807 (D.C. Cir. 1929). Unquestionably, the Congress knows how to limit this discretion, as, for example, in the "report" provisions of the Bank Merger Act (12 U.S.C. § 1828(c)) and the

certification provisions of the Federal Deposit Insurance Act (12 U.S.C. §§ 1814 and 1816). Against this statutory background, it would be strange indeed to assume that the Comptroller's discretionary "approval" is limited by a requirement that he make written findings concerning some undefined standard of state law dealing with economic and banking factors. *Cf. Sterling National Bank of Davie v. Camp,* 431 F.2d 514 (5th Cir. 1970), *cert. denied,* U.S. (February 22, 1971).

Third, as the Court of Appeals recognized in *Smithfield* "That the phrase 'restrictions as to location' [in 12 U.S.C. § 36(c)] does not avert to economic factors of needs and convenience, but refers exclusively to a geographical determination is quite plain from the legislative history of the Act." Instead, it was clearly recognized by the Congress that they were ". . . legislat[ing] for a national banking system. . ." in which the effort was directed to providing national banks with statutory authority to branch in those geographic areas in which state banks were allowed to branch. See 77 Cong. Record, 3726, 4159-4181, 4182, 5863, 5895-5897. Within the established geographical limits, "branch banking would be permitted. . . at the discretion of the Comptroller of the Currency." S. Rept. No. 473, 69th Cong., 1st Sess., p. 8. There is no evidence of any desire on the part of the Congress to destroy the duality of the national and state banking systems by attempting to import anything more than "restrictions as to location" in state branching statutes into the National Bank Act. As the Third Circuit Court of Appeals has noted in discussing *First National Bank in Logan v. Walker Bank & Trust Co.,* 385 U.S. 252 (1966)–relied upon by the Fourth Circuit in the *First-Citizens* case–and the later Supreme Court case of *First National Bank in Plant City v. Dickinson,* 396 U.S. 122 (1969):

> . . . Mr. Chief Justice Burger stated that even in matters of branching, Congress was quite specific as to which provisions of state law were to be incorporated.

The Ramapo Bank v. Camp, 425 F.2d 333 (1970), *cert. denied*, 400 U.S. 828; see also *Howell v. Citizens First National Bank of Ridgewood*, 385 F.2d 528 (3d Cir. 1967).

Fourth, as already noted, a possibility of conflict exists between state and federal law or policies. The more than 100 years history of the Comptroller's Office has demonstrated periods when the growth of the national banking system was deliberately either retarded or stimulated in order to foster national economic policies. In addition, national statutes embody policies on civil rights, competition and antitrust law, interstate and foreign commerce, housing and urban redevelopment and food and agriculture—all of which can and have been promoted in various ways through the establishment and use of national bank branches. Whatever the meaning of the North Carolina statute, therefore, the national policies favoring competition embedded in such statutes as the Sherman Antitrust Act, 15 U.S.C. §§ 1-7, the Clayton Act, 15 U.S.C. §§ 12-27, and, to some extent, the Bank Merger Act, 12 U.S.C. § 1828(c), unquestionably give the Comptroller power to consider this factor in ruling upon national bank branch applications.

Fifth, 12 U.S.C. § 36(c) has never been interpreted by the Comptroller's Office or by any other federal bank regulatory agency to impose upon the national government economic and similar non-location restrictions which the states may choose to place upon state-chartered banks. Twenty-four states have statutes similar

to North Carolina's Section 53-62(b). In none of these states has the Comptroller ever made the finding ostensibly required by the state statute of the State Banking Commissioner, and a number of such branch approvals have been upheld by the courts. See, *e.g., The Ramapo Bank, supra,* and New Jersey Statutes §17:9A-20.

The Comptroller therefore declines here, and in three other opinions issued today approving branches in North Carolina [6] to make the findings required of the State Banking Commissioner by Section 53-62(b) of the North Carolina General Statutes. For the reasons stated herein, the Comptroller approves the application of Wachovia Bank & Trust Company, N.A., Winston Salem, North Carolina, to establish a branch in the Hickory Plaza Shopping Center on U.S. Highway 64-70, Hickory, Catawba County, North Carolina.

William B. Camp
Comptroller of the Currency

Dated: February 22, 1971

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[6] The other branch approvals have been issued in connection with the application of the First Union National Bank of North Carolina, Charlotte, North Carolina, for permission to establish a branch in the vicinity of the intersection of U.S. Highway 29 and Club Road, Concord, Cabarrus County, North Carolina; the application of Southern National Bank of North Carolina, Lumberton, North Carolina, to establish a branch in the Roanoke Rapids Shopping Center located on U.S. Highway 158 near Roanoke Rapids, Halifax County, North Carolina; and the application of the Southern National Bank of North Carolina, Lumberton, North Carolina, for permission to establish a branch at 107-109 Fayetteville Street, Clinton, Sampson County, North Carolina.